COMMENT: ACCOUNTABILITY AND INDEPENDENCE IN FINANCIAL REGULATION: CHECKS AND BALANCES, PUBLIC ENGAGEMENT, AND OTHER INNOVATIONS

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I
INTRODUCTION

Financial regulation attempts to balance two competing administrative goals. On the one hand, as with much of administrative law, accountability is a core goal. Accountability undergirds the democratic legitimacy of administrative agencies. On the other hand, unlike with much of administrative law, independence plays a critical role.[1] Independence helps to protect financial regulatory agencies from political interference and—with some important caveats—arguably helps to guard against some forms of industry capture. In addition, with respect to the Federal Reserve (the Fed), independence serves to improve the credibility of the Fed's price stability mandate by insulating its decisionmaking from politics and, in particular, from the political pressure in favor of easy money during election cycles.

These values, of course, are in tension. "Too much" accountability—at least in some forms—may reduce independence. "Too much" independence—at least in some forms—may reduce accountability. Moreover, steps to meet one or the other of these goals may also affect the efficacy of the organization. Having a financial regulatory system that properly balances accountability and independence, but fails to protect households from abuse and the real economy from the catastrophic failure of the financial sector, cannot be anyone's goal.

To foster accountability, scholars of administrative law have looked to congressional oversight, presidential control, and judicial review.[2] Each of these

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1. *See* Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS., no. 3, 2015 at 129.

2. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2253–72, 2281–319 (2001) (describing several approaches to presidential administration).

has its own weakness and has been the subject of extensive academic debate, but, as has been pointed out elsewhere in this issue, this literature is often not concerned with, or even aware of, the literature discussing financial regulation.[3] Yet financial regulation often raises unique problems that may not neatly align with the literature on administrative law mechanisms of congressional oversight, presidential control, or judicial review. In the context of financial regulation, congressional oversight may be somewhat muted, for example, by the budgetary independence of most financial regulatory agencies. That budgetary independence is designed in part to reduce the ability of the financial industry to lobby Congress to cut or condition agency funding on particular enforcement or regulatory outcomes. Congress also tends to delegate to financial agencies significant, core questions regarding financial institution supervision, such as capital rules. Presidential control of financial agencies is often viewed with some suspicion, out of fear of improper political interference in enforcement and supervision, and since the New Deal, financial regulatory agencies have been given a great deal of independence through a range of practices.[4] Although judicial review plays an important role in cabining financial agency action, such oversight exists at the edges, with significant aspects of financial regulation committed to agency discretion under broad congressional delegations. Many financial regulatory decisions involve probabilistic judgments about risk, such as whether a bank's failure might lead to financial panics, which are not readily subject to judicial second-guessing.

Moving from the mechanisms of oversight to its procedural norms, an important aspect of legitimacy is transparency and expertise: showing that the decisionmaking is based on the right substantive standard and arrived at through the right procedural means—on informed, data-driven expertise rather than on some arbitrary basis.[5] An expertise-driven model began as a response to the market failures that spurred the Great Depression and the resulting demand for regulatory action.[6] Unsurprisingly, administrative agency expertise is one of the primary factors shaping judicial review of agency action.[7] Further, transparency in financial regulation has long been championed in the United States. Justice Brandeis, pointedly writing about the risks of oversized financial trusts, famously called sunlight "the best of disinfectants."[8] Transparency reinforces procedural norms and buttresses substantive outcomes by engaging

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3. *See* Gillian E. Metzger, *supra* note 1, at 130–31.

4. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 777 (2013).

5. *See generally* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 515–53 (2003) (arguing that a model focusing more directly on arbitrariness, rather than presidential control, suggests new posibilities for solving the problem of agency legitimacy).

6. *Id.* at 471.

7. *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2072 (1990).

8. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 89 (Melvin I. Urofksy ed., 1995) (1914).

the public.

In addition, independence from political influence has been an important part of agency formation and an important measure of expertise-driven decisionmaking.[9] The typical features identified in such agencies frequently include for-cause agency-head removal, tenure protection, and other measures, which vary significantly by agency.[10] Historically, financial regulatory agencies, particularly the Fed, have retained independence from the Presidency.[11] Even financial regulatory agencies, such as the SEC that lack explicit at-will removal protection, have come to be understood to enjoy removal protection simply by virtue of their functional role and objective.[12] Although independence serves important values, a substantial drawback to multiagency independence in the financial regulatory context has been the problem of turf wars and conflicting approaches to regulation without a means of effective presidential coordination and dispute resolution.[13]

Professor Kathryn Judge helpfully points out in this issue that soft norms can play an important role in reinforcing both independence and accountability. While acknowledging that independence and accountability can be in tension with one another, Judge argues that soft constraints, such as the reputation of the Fed Chair, or principles for conducting monetary policy, can reinforce the legitimacy of institutions that otherwise may not sufficiently reflect democratic values of accountability, without undermining agency independence.[14] These soft constraints may help to mediate between these competing values without requiring Congress to have chosen sharply in favor of one or the other in any particular issue. Soft law itself, however, as Judge points out, may ossify into something less useful, pushing regulators to continue on a path that no longer makes sense;[15] one of the defining reasons why Fed Chairman Ben Bernanke was successful in tackling the financial crisis from 2007 through 2009 was that he was willing to break free from the soft constraints of prior Fed policy and aggressively attack the panic.[16]

In addition to balancing independence and accountability, the financial regulatory system has to produce results. At a minimum, that means protecting households, businesses, taxpayers and the real economy from abusive practices and catastrophic collapse. In the lead-up to the financial crisis of 2008, however,

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9. Datla & Revesz, *supra* note 4, at 770–71.

10. *Id*. at 786, 789, 792, 797, 804.

11. *See* Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 504–05 (2000).

12. Patrick Jiang, Free Enterprise Fund v. PCAOB*: In Which A Great Case Makes Bad Law*, 92 B.U. L. REV. 701, 725 (2012).

13. *See* Thomas A. Russo & Marlisa Vinciguerra, *Financial Innovation and Uncertain Regulation: Selected Issues Regarding New Product Development*, 69 TEX. L. REV. 1431, 1434–35 (1991).

14. *See generally* Kathryn Judge, *The Federal Reserve: A Study in Soft Constraints*, 78 LAW & CONTEMP. PROBS., no. 3, 2015 at 65.

15. *Id.* at 68–87.

16. *Id.* at 78–84.

the financial sector piled ill-considered risk upon risk, held lower and lower levels of capital as a buffer against loss, engaged in practices that misled and harmed consumers and investors, and ultimately put the whole U.S. economy at risk. During this period, regulators failed to meet the basic substantive goals of financial oversight.

In addition to soft law, other techniques may be used to mediate the tension between independence and accountability while maintaining a focus on efficacy. In particular, I want to briefly examine how regulatory checks and balances, public engagement, and other innovations can help to promote accountability while preserving independence. In the aftermath of the financial crisis, the Obama Administration (in which I served) worked with Congress to enact major reforms aimed at substantively improving the safety of the financial system. The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank) put in place new oversight of "shadow banking," established a process to wind down major financial firms in the event of collapse, reined in risky derivative and other trading and financing activities, improved supervision of major financial firms, and strengthened consumer and investor protections.

In doing so, Congress did not legislate on a blank slate, but instead sought to reform the existing regulatory infrastructure, which is decidedly non-Platonic in shape and form. Although Dodd–Frank was able to eliminate one of the worst performing regulatory agencies, the Office of Thrift Supervision, much of the superstructure of the financial regulatory system remained intact. Political turf battles in Congress and among the regulatory agencies meant that some common-sense changes to the financial "org chart," such as merging the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), or fully clarifying the bank supervisory responsibilities among the Fed, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) were impossible to achieve. That meant that Dodd–Frank had to use other methods to reduce opportunities for regulatory arbitrage, industry capture, and gaps in supervision and regulation.

Moreover, even in countries that had much simpler regulatory structures, such as the United Kingdom, the financial crisis hit with devastating consequences. The UK had a "single peak" regulator before the crisis; that is, one regulatory body, the Financial Services Authority (FSA), regulated the entire financial services industry. In principle, this market-wide view would permit the regulator to see risks across the market and to respond to them quickly. In addition, the FSA was independent of the government and of the Bank of England. In principle, this independence would leave the FSA free to focus on the efficiency and safety of the financial system, without regard to monetary policy or political goals. In practice, the FSA was overwhelmed by the force of the financial crisis, and the Bank of England, which was called upon to provide liquidity to the system, was not sufficiently aware of the scale and scope of the problems to be effective. Since the crisis, the UK has moved to a "twin peaks" model, with prudential regulation moved back within the Bank of England. Ideal organizational form, it appears, is neither necessary nor sufficient for preventing or fighting financial crises.

In crafting Dodd–Frank, we consciously set out to develop and enact innovative ways of advancing the accountability, independence, and efficacy of the regulatory system, while working within severe political constraints of the legislative process. We focused on improving how regulators: (1) interact and coordinate, (2) respond to new and overlooked problems, (3) gather and assess information, and (4) remain accountable to the public. Although we could not eliminate turf battles, we sought methods to encourage or force better agency coordination; reduce or eliminate differences in the regulation of functionally similar products, services, or institutions; and reduce opportunities for races to the bottom in regulatory oversight. We sought to instill positive incentives for regulatory checks and balances, and to engage the public in increasing the accountability of the regulatory agencies. We also took those same values into account in crafting the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the CARD Act),[17] which was designed to eliminate bad practices in the credit card markets. The remainder of this comment briefly outlines some examples of these administrative innovations, although, given space constraints, fuller exposition will need to await another time.

II
REGULATORY CHECKS AND BALANCES

Given the fractured nature of the U.S. regulatory system, the Dodd–Frank Act created a new federal entity, the Financial Stability Oversight Council (FSOC),[18] to look out for risks across the financial system, designate systemically important firms and markets for heightened supervision and regulation regardless of the charter or corporate form of the financial entity, coordinate across regulatory agencies, and try to make sure that prudential standards promulgated by agencies are sufficiently robust to protect against systemic risk. The Council consists of the heads of the financial regulatory agencies, with the Secretary of Treasury serving as Chairperson, and each of the primary agency heads having one vote.[19] Nonvoting members also participate in the Council. The FSOC's authorities fill important gaps in the system and help to reduce the risk of regulatory arbitrage.

The FSOC is given the authority to nudge the prudential regulators into action.[20] If the Council determines that particular financial activities are creating

17. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009).

18. 12 U.S.C. § 5321(a) (2012).

19. § 5321(b).

20. § 5330. We initially favored a more robust approach, under which the FSOC could ultimately force the agency to raise standards. A number of agencies objected, in part arguing that the FSOC

or increasing the risk of significant stress to the nation's financial markets, it is authorized to issue recommendations to the primary federal regulatory agencies to heighten their regulatory standards.[21] The prudential regulators are required to put these recommendations into place, or to explain publicly why they are not implementing them.[22] The FSOC must then report to Congress on the responsiveness of the regulator to its recommendations.[23] This system enables the group of agency heads to place pressure on a recalcitrant or lagging member agency. It can also help to reduce the risk of uneven regulation among agencies. Furthermore, the public nature of the process enlists not only Congress but, perhaps more importantly, the public to exert pressure on the agency to act.[24]

For example, in November 2012, the FSOC began taking public comment on a proposed recommendation to the SEC providing for three alternative options for reform to money market funds.[25] This came just forty-seven days after SEC Chairman Mary Schapiro announced that, due to lack of support from a majority of commissioners, the SEC would be unable to advance proposed money market fund reforms.[26] The SEC's recalcitrance prompted the FSOC, under the urging of Treasury Secretary Geithner and SEC Chairman Schapiro, to issue its "Section 120 proposal."[27] Responding to this action, the SEC issued its own proposal on money market fund reforms.[28] The SEC has finalized the rule, and although it falls far short of the FSOC's proposals, the actions are at least more robust than those contemplated before the FSOC's prodding.

The FSOC also possesses the power to seek to resolve disputes between feuding agencies under its jurisdiction.[29] To trigger this authority, agencies in a dispute must be unable to resolve the conflict through good faith effort, and one agency must provide a written request for the Council's involvement.[30] FSOC recommendations must provide a written explanation and must be approved through a two-thirds vote.[31] The recommendations issued by the FSOC are

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might, under the guise of purporting to raise standards, actually lower them, while others simply sought to protect their turf under the guise of "independence" from the FSOC, on the grounds that it was chaired by a presidentially appointed Treasury Secretary.

21. § 5330(a).

22. § 5330(c)(2).

23. § 5330(d).

24. *See generally* Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689 (2013).

25. FIN. STABILITY OVERSIGHT COUNCIL, 2013 ANN. REP. 129 (2013).

26. Dwight C. Smith, *Money Market Funds: FSOC Proposes Reforms*, HARV. LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Dec. 9, 2012, 10:11 AM), http://blogs.law.harvard.edu/corpgov/2012/12/09/money-market-funds-fsoc-proposes-reforms/.

27. *Id.*

28. Press Release, Securities and Exchange Commission, SEC Proposes Money Market Fund Reforms (June 5, 2013) (on file with author).

29. 12 U.S.C. § 5329 (2012).

30. § 5329(a).

31. § 5329(b)–(c).

nonbinding,[32] but create a forceful public statement that should place pressure on the parties to the dispute.

In addition, the FSOC includes measures intended to maintain its accountability to both the President and Congress. Through the Secretary of the Treasury, who is also the Chair of the FSOC, the President retains important oversight of the FSOC.[33] The FSOC also has annual reporting duties to Congress.[34] The voting members of the Council are independently required to attest to their views of the FSOC's efforts at mitigating systemic risk,[35] and if the member believes that the Council is not up to the task, the member's statement must outline the steps that they believe are necessary to be taken.[36] Additionally, the Secretary of the Treasury, in her capacity as Chair, must testify before Congress to discuss the annual report.[37]

Dodd–Frank also created the Office of Financial Research (OFR), a new agency lacking its own "turf" in the sense that it does not directly supervise or regulate financial institutions. Instead, OFR is tasked with gathering information across the financial market, as well as providing research for the Financial Stability Oversight Council and its member agencies.[38] It also has rulemaking authority to standardize and collect data from financial institutions and markets.[39] Critically, OFR can act as an independent voice regarding financial stability, serving as a counterweight to the Fed and other supervisory agencies. In doing so, the OFR must report annually to Congress on threats to financial stability.[40] A robust OFR could provide an important check and balance to other regulatory agencies, and provide incentives to them to improve their own performance or risk being called out.[41] A dedicated OFR may also help regulation keep up with financial innovation and risk modeling.[42]

The FSOC and OFR can serve as counterweights to the financial industry as well as to other regulatory agencies. The FSOC and OFR can help reduce risks from regulatory arbitrage in a fractured regulatory system by implementing a series of requirements for joint rulemaking, or alternatively, requirements that standards of one set of agencies be at least as stringent as another's.[43] "B team" analysis of systemic risk, the ability to gather data throughout the financial

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32. § 5329(d).

33. § 5321(b)(1)(A).

34. § 5322(a)(2)(N).

35. § 5322(b).

36. § 5322(b)(2).

37. § 5322(c).

38. § 5342–5343.

39. § 5343(c).

40. § 5344(d).

41. Eugene A. Ludwig, *Assessment of Dodd–Frank Financial Regulatory Reform: Strengths, Challenges, and Opportunities for a Stronger Regulatory System*, 29 YALE J. ON REG. 181, 184 (2012).

42. Jeff Merkley & Carl Levin, *The Dodd–Frank Act Restrictions on Proprietary Trading and Conflicts of Interest: New Tools to Address Evolving Threats*, 48 HARV. J. ON LEGIS. 515, 549 (2011).

43. *See, e.g.*, 12 U.S.C. § 712(a)(8), § 731(e)(2), § 165(i)(2)(C), § 619, § 941(b), § 1471, § 205(h), § 165(d)(8).

system (regardless of supervisory jurisdiction), and the ability to force public debate over regulatory standards and jurisdictional lines through public "nudges" may prove to be critical in a world in which the regulatory architecture is far from ideal and in which systemic risk analytics remain an uncertain and evolving field. Together with a newly invigorated Federal Reserve, charged with overseeing systemically important firms and markets, these new entities may help to reduce the risk that our next financial crisis crushes the real economy.

III
PUBLIC ENGAGEMENT

Public engagement is another key strategy to help independent agencies remain accountable, and to help them stay focused on substantive regulation that meets the needs of households and businesses. Dodd–Frank established a new agency to look out for the interest of households: the Consumer Financial Protection Bureau (CFPB).[44] Although formally housed within the Federal Reserve System to lessen political opposition to the creation of a new agency, the CFPB has strong, statutorily provided independence from the Fed (and the President) on policy, enforcement, budget, regulatory, and all other matters. Other features contributing to the CFPB's independence include a single Director with a five-year term who is removable only for cause,[45] and automatic funding through earnings of the Federal Reserve System, subject to a cap, rather than congressional appropriations.[46]

Balanced against its independence are carefully crafted provisions to ensure that the Bureau remains publicly accountable for its accomplishments and failures. The Director is required to appear twice a year before the Senate Committee on Banking, Housing, and Urban Affairs, and the House Committees on Financial Services and Energy and Commerce.[47] In anticipation of these meetings, the CFPB is required to compile a comprehensive report, to be submitted to the Committees and to the President.[48] This report is required to include a discussion of obstacles to consumer financial well-being, a justification of the Bureau's budget, a list of significant rules and orders adopted by the Bureau and the plans for the coming period, an analysis of consumer complaints, a list of supervisory and enforcement actions, an analysis of its actions taken with respect to nonbanks, and an analysis of efforts to meet diversity and fair lending objectives.[49] This extensive array of reporting requirements forces the Bureau to demonstrate to Congress on a continuous basis that it is working to accomplish its mission.

44. Consumer Financial Protection Act of 2010, 12 U.S.C. § 5491 (2012).
45. § 5491(b)–(d).
46. § 5497(a).
47. § 5496(a).
48. § 5496(b).
49. § 5496(c).

Another strategy to engage the public is through crowdsourcing of data. Although data collection is a traditional function of administrative agencies, Dodd–Frank broke new ground by coupling it with public engagement—for example, through the consumer complaint function. The Act mandates that the Bureau set in place procedures to provide consumers with timely responses to their complaints.[50] Such complaints are to follow a particular procedure, whereby the complaints submitted are to be provided by the CFPB to the regulated entity, which in turn provides relevant information to the consumer.[51] The Bureau is required to provide a summary of the procedures taken and responses received.[52] Further, it actively solicits consumer complaints[53] and has handled hundreds of thousands of complaints over the last two years.[54]

In addition to investigating individual consumer complaints,[55] the CFPB uses the information from consumers to analyze and prioritize issues for supervisory, enforcement, and regulatory action.[56] The CFPB also releases consumer-complaint data publicly under its reporting duty.[57] This database provides a new tool for the agency and the public to hold financial institutions accountable.[58] The CFPB also has new tools to engage private financial institutions in improving disclosures. For example, the CFPB can grant safe harbors to permit private firms to experiment with providing consumers with innovative disclosures that may better meet household needs than the current approach.

The CARD Act also embodies reform through public engagement.[59] Now administered by the Consumer Financial Protection Bureau, the CARD Act utilizes information-gathering and publication procedures similar to those in the consumer-complaint mechanism.[60] For example, the CARD Act amends the Truth in Lending Act to create new electronic disclosure requirements for credit card companies.[61] Creditors are required to maintain a website on which all written credit card agreements must be provided.[62] They are further required

50. § 5534(a).

51. § 5534(b)–(c).

52. § 5534(b).

53. *See Submit a Complaint*, CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov/complaint/ (last visited Mar. 25, 2015).

54. 2014 CFPB CONSUMER RESPONSE ANN. REP. at 12.

55. *Id.* at 38.

56. *Id.* at 2.

57. *See* § 5496(c); *see also Consumer Complaint Database*, CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov/complaintdatabase/ (last visited Jan. 6, 2015).

58. *See* Lee Drutman, *A Win for Open Data: CFPB's Consumer Complaint Database*, SUNLIGHT FOUNDATION (Apr. 22, 2013, 3:44 PM), http://sunlightfoundation.com/blog/2013/04/22/consumer_complaint/.

59. *CARD Act Factsheet*, CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov/credit-cards/credit-card-act/feb2011-factsheet/ (last visited Mar. 25, 2015).

60. *Id.*

61. Truth in Lending Act, 15 U.S.C. § 1632(d) (2012).

62. § 1632(d)(1).

to turn over these contracts in electronic form to the CFPB.[63] In turn, the CFPB is required to provide these contracts publicly on its site in a readily accessible form.[64] Consumer advocacy organizations and third party vendors can use this data to put competitive pressure on firms to improve consumer protections and price transparency in credit card contracts.

IV
CONCLUSION

The financial crisis sparked innovations in substantive financial regulation and administrative law designed to balance independence and accountability, while improving the efficacy of financial oversight. In many respects, these innovations acknowledge that our regulatory infrastructure is far from ideal, but they would be essential even in far simpler and perhaps more preferable regulatory structures. Only time will tell whether these innovations will be enough to overcome not only regulatory turf battles and congressional inattention or hostility, but also industry lobbying and the pace of financial innovation. The financial sector has already challenged a number of these policies, both in Congress and in the courts. Putting in place regulatory checks and balances, increasing transparency, and engaging the public can be bulwarks against complacency and the slide towards amnesia, willful or otherwise, about the causes and consequences of our most recent and brutal financial crisis. But the fight over financial reform is far from over, and whether the public will win out in the end is far from assured. Changing finance so that it is fairer and safer, and better harnessed to the needs of the real economy is, or ought to be, our shared challenge.

63. § 1632(d)(2).
64. § 1632(d)(3).